

STATE OF MINNESOTA

DISTRICT COURT

In re: Source Code Evidentiary Hearings in
Implied Consent Matters

Consolidated File No. 70-CV-09-19459

In re: Source Code Evidentiary Hearings in
Criminal Matters

Consolidated File No. 70-CR-09-19749

**ORDER 10 – ORDER
DENYING MOTION TO
WAIVE FILING
REQUIREMENTS FOR NON-
DISCLOSURE
AGREEMENTS**

This matter came before the undersigned on June 29, 2010 at the Scott County Justice Center, Shakopee, Minnesota pursuant to a June 15, 2010 Order of the Court setting the matter for hearing. Appearances were as noted on the record. The issue before the Court was a motion brought by Liaison Counsel Steve Holmgren and Pam King on behalf of defendants in cases wherein the individual public defender appointed to represent the defendant has not consented to the assignment of the individual case to the undersigned. The lack of consent is due to a concern regarding the non-disclosure agreement filing requirement imposed by the Court. The motion was specifically not brought on behalf of defendants represented by public defenders whom had already consented to the assignment of the undersigned.

The motion was directly opposed by memorandum filed by Liaison Counsel William Bernard and Pam Converse. Liaison Counsel Sean McCarthy and Mark Schneider joined in the opposition to the motion at the hearing. Liaison Counsel Kristi Nielsen filed a letter in opposition to the motion. Liaison Counsel Derek Patrin, Marsh Halberg, Jeffrey Sheridan, Chuck Ramsay, and Lee Orwig took no position on the matter.

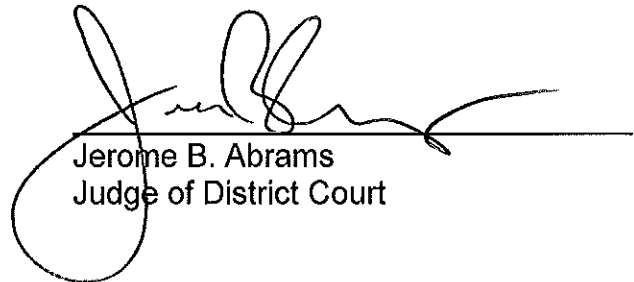
Based upon the arguments of counsel, the proceedings in these actions and related matters, and the entire record before it, the Court hereby makes the following:

ORDER

1. The relief sought by the motion for permission to file an affidavit from counsel asserting an expert had been retained in lieu of filing an executed non-disclosure agreement is denied.
2. The attached memorandum is incorporated herein by reference.

Dated: July 20, 2010

BY THE COURT:



Jerome B. Abrams
Judge of District Court

MEMORANDUM

A sub group of defendants whose blood alcohol concentration was tested using the Intoxilyzer 5000EN have brought a motion seeking waiver of a filing requirement imposed by the Court as a prerequisite to having their individual matter assigned pursuant to Chief Justice Eric J. Magnuson's January 11, 2010 Order, A09-2109 (hereinafter "Statewide Assignment Order"). After the Statewide Assignment Order was issued, this Court issued two Case Management Orders. One was to govern the assigned proceedings in all criminal matters while the other governed all civil implied consent matters.¹ As part of issuing these Orders, the Court identified Liaison Counsel who would perform certain duties with respect to identifiable groups interested in these proceedings. Liaison Counsel appointed with respect to the criminal defendants included Charles Ramsay, Jeff Sheridan, Marsh Halberg, Derek Patrin, Lee Orwig, Pam King, and Steve Holmgren.² These Liaison Counsel have divided themselves into three identifiable groups; the Source Code Coalition (hereinafter the "Coalition"); the Patrin Group; and the Minnesota State Public Defenders.³

The motion before the Court has been brought by Liaison Counsel Pam King and Steve Holmgren on behalf of a sub group of defendants represented by the Minnesota State Public Defender's Office. These defendants are those whose blood alcohol concentration was tested using the Intoxilyzer 5000EN and are interested in challenging

¹ Although this motion has not been brought on behalf of any Petitioner in an assigned or potentially assignable implied consent matter and the motion is not directly applicable with respect to those cases, the non-disclosure filing requirement does apply.

² Robert Stoneburner was also initially appointed as Liaison Counsel but requested this appointment be terminated. The Court granted this request pursuant to Order 7 – Order Granting Request for Withdrawal as Liaison Counsel, signed June 16, 2010.

³ Marsh Halberg, Jeff Sheridan, Charles Ramsay, and Lee Orwig are liaising on behalf of the Coalition. Derek Patrin is liaising on behalf of the Patrin Group. Steve Holmgren and Pam King, both public defenders, are liaising on behalf of the Minnesota State Public Defender's group.

the reliability of the source code used in the operation of the Intoxilyzer 5000EN as part of their defense. They are also interested in having the resolution of this issue assigned to this Court pursuant to the Statewide Consolidation Order but have not yet taken the procedural steps necessary to accomplish this reassignment. Specifically, these defendants have not yet executed or filed a written notice of consent to assignment as set forth in Exhibit A, attached to Order 1 – Order Regarding Pending Source Code Cases Subject to Statewide Consolidation signed by the Court on February 23, 2010 (hereinafter “Order 1”). They have also not filed a non-disclosure agreement executed by the expert or experts they intend to use to analyze the source code as required by Order 1. Liaison Counsel Pam King and Steve Holmgren specifically informed the Court the current motion is not being brought on behalf of defendants who have already executed and filed the required written notice of consent to assignment and non-disclosure agreement.

This sub group of defendants is seeking waiver by the Court of the prerequisite requirement that they file a non-disclosure agreement before they would be reassigned for resolution of the Intoxilyzer 5000EN issue. These defendants request they be allowed to file an affidavit from their counsel which will state that a non-disclosure agreement has been executed in lieu of filing the actual non-disclosure agreement. The professed concern is that the filing of the non-disclosure agreement identifies an expert witness retained for their defense who may not testify and they argue being required to disclose the identity of this witness is in contravention to Rule 9.02 of the Minnesota Rules of Criminal Procedure. Liaison Counsel also conveyed, on behalf of the public defenders representing this sub group of defendants, concern over how the hearing

process would proceed, their ability to adequately represent their clients, and a desire to see the expert reports before deciding whether to consent to assignment of these matters before this Court. The Liaison Counsel for the prosecution group expressed its opposition to this motion.

Standing

As a preliminary matter, the prosecution group challenged the standing of the sub group of the defendants to raise this issue when they have not yet consented to the assignment of this Court in accordance with the Statewide Assignment Order. "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a . . . court and not on the issues he wishes to have adjudicated." Sundberg v. Abbott, 423 N.W.2d 686, 688 (Minn. App. 1988), pet. for rev. denied (Minn. June 29, 1988) (quoting Flast v. Cohen, 392 U.S. 83, 99 (1968)). See also State v. Philip Morris Inc., 551 N.W.2d 490, 493 (Minn. 1996) (stating "[s]tanding is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court"); Riehm v. Commissioner of Public Safety, 745 N.W.2d 869, 873 (Minn. App. 2008) (finding standing for implied consent petitioner to challenge scheduling policy). "The essential question is 'whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.'" Id. (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

The sub group of defendants bringing this motion has standing because they have a sufficiently realized stake in the issues being litigated. The prosecution group argued this defendant sub group does not yet have standing to raise this issue because they have not yet consented to assignment of this Court. The issue raised by the

defendants' motion, however, is to the procedure implemented to consent to assignment. To obtain the necessary standing to challenge the procedure, the defendants do not first need to comply with the very thing they are challenging. Rather, the defendants have standing because they are involved in a case in which the reliability of the source code for the Intoxilyzer 5000EN is being questioned. This Court has been assigned to address these issues and in providing a forum for them to be heard. The defendants bringing the current motion are parties with the type of case contemplated as being matters for which consent to assignment of this Court would occur. As such, this sub group of defendants has standing to bring this motion.

Reasons for Assignment Procedure

The assignment procedure followed by this Court and the parties is the product of a long and complicated litigation history, the Court's need to implement effective case management tools, and a desire to ensure everyone's rights are protected. The challenge to the reliability of the Intoxilyzer 5000EN source code has been litigated now for several years. The first contested issues arising in this litigation involved disputes over whether criminal defendants and implied consent petitioners were entitled to the source code in discovery and how they could obtain access to it. Towards resolution of these issues, a lawsuit was commenced in United States District Court for the District of Minnesota (hereinafter "Federal Lawsuit").

A Consent Judgment and Permanent Injunction were issued by the Federal Court. This Judgment provided a means by which criminal defendants and implied consent petitioners could obtain access to the source code. To obtain access, a state district court judge had to issue a protective order and any person receiving access was

to execute a non-disclosure agreement.⁴ None of the parties hereto, and notably the movants herein, objected to the requirement of a non-disclosure agreement. Moreover, despite Case Management Orders in the predecessor First Judicial District consolidated proceedings, and other proceedings wherein the signed and filed non-disclosure agreements were required to participate in any challenge to the source code, no objection to this procedural pre-requisite was asserted until raised by the movants herein.

With a clearly defined procedure for access to the source code resolving the federal litigation, numerous state district court judges began ordering discovery of the source code, issuing protective orders, and requiring the filing of non-disclosure agreements. The First Judicial District in particular required the filing of non-disclosure agreements as part of the district wide assignment of source code challenge matters to this Court. The filing requirement was put in place for several reasons. First, there was a need to be able to identify and track cases which were being specially assigned. The filing of the non-disclosure agreement acted as a recorded and easily identifiable means of separating cases which were assigned from those which were not. Second, the filing requirement for non-disclosure agreements allowed the Court to know whether an expert had been retained to address this highly technical issue. No one disputes the issues being litigated in these matters can only be resolved with expert evidence. Finally, the filing requirement informed the Court of the identity of the experts

⁴ The procedures required by the Federal Court Judge admittedly were not “binding” on state courts. However, practically speaking, no access to the source code for the Intoxilyzer 5000EN would be allowed by CMI of Kentucky, Inc. unless the procedure set forth by the Federal Court was followed and a non-disclosure agreement was signed. Interaction by parties with interests similar to movants herein was allowed and occurred with regard to approval of the terms of the settlement which permitted access to the source code in accordance with a process that required the non-disclosure agreement.

conducting a review. This provided the Court with a basis to identify discrete and manageable groups of counsel and experts with whom discovery and pre-trial management processes could occur. Without identification and management, resolution of these matters would have been unnecessarily and unduly complicated and delayed.

Following a motion by several municipal prosecutors, the Chief Justice of the Minnesota Supreme Court issued the Statewide Assignment Order which assigned certain matters to this Court. These matters included all implied consent matters raising a challenge to the source code, a specific list of criminal matters wherein the defendant was not represented by a public defender, and all criminal matters in which the prosecuting authority and defendant consented to the assignment.⁵

As a result of the assignment of the source code issue on a statewide basis to this Court, procedures were developed whereby a matter could be assigned. These procedures included submission of a standard Written Notice of Consent to Assignment as well as continuing the requirements for issuance of a protective order and filing of a non-disclosure agreement.⁶ Although the standardized consent provided an alternative means of identifying and tracking criminal cases as they were assigned, it did not provide a means of identifying what experts were being retained in which cases. The non-disclosure agreement remained a document already in existence which identified the expert and the case and refrained from imposing an additional filing burden upon parties already concerned with conserving resources. In many cases, it had also already been executed because only three discrete groups of experts have ever been

⁵ Matters in which this Court had previously been removed were assigned to another judge.

⁶ For Implied Consent matters only the issuance of a protective order and filing of a non-disclosure agreement are required.

identified.⁷ The vast majority of all implied consent petitioners and criminal defendants, including many represented by public defenders, elected to join the Coalition and their group of experts to consolidate their resources. In doing so, they obtained copies of non-disclosure agreements executed by the jointly retained experts which were then filed in compliance with the assignment process.

“The court has the inherent power to advance the ends of justice by pretrial procedures in criminal cases, especially if issues or procedures are complicated or protracted. Pre-trial proceedings may be used to refine issues, establish rules for handling voluminous evidence, resolve procedural problems, and provide an atmosphere which will simplify and expedite the trial.” 23 Ronald I. Meshbeshier, Minnesota Practice Series: Minnesota Trial Handbook for Minnesota Lawyers § 2:25 (2009). This Court exercised its inherent power, and the authority delegated to it by the Statewide Assignment Order, to establish these procedures in light of the history surrounding the litigation of the source code issue. It is this history and the unique needs of this litigation which have led to the process implemented by the Court and so far, the process has accomplished its goals of taking into the account the litigation history, providing for effective case management, and ensuring the protection of everyone’s rights. The process is one which has been followed by parties, including those represented by public defenders, in the statewide context for more than four months and for approximately six months before that in the First Judicial District context. It is a process that has, thus far, worked well for the parties who have followed it and continue to follow it in the statewide context in seeking to be a part of the consolidated

⁷ The parties seeking to rely upon one of these expert groups has since abandoned their own review and joined the Coalition’s group of experts.

litigation.

Consensual Process

For criminal matters the assignment of a specific case to this Court for resolution occurs only when the prosecuting authority and the defense both consent to the assignment. The Statewide Assignment Order allows defendants to elect not to consent to the assignment and instead directs counsel and the courts to work together to develop additional methods of resolution when a party does not consent. It is likely far more economical for parties to consent and joint this proceeding because it allows the pooling of resources to pay for what the parties have identified as expensive experts. In the matters before this Court, nearly every party has joined the Coalition's efforts to examine the source code. Of the two groups that initially started out with their own experts, one has completely joined the Coalition's efforts and the other group has informed the Court its efforts are going to be a supplement to the Coalition's efforts, not a replacement. If the sub group of defendants objecting to the filing requirement truly believes that an issue is created by the non-disclosure filing requirement, then they could elect not to consent to this process.

No Impairment of any Rights

The defendant sub group has brought this motion to prevent disclosure of the identities of the Coalition's experts. The defendants recognize the economical situation and were planning on pooling their resources with the Coalition and thereby enjoying the benefits of the Coalition's retained experts. The identities of these experts, however, have been known to the Court and anyone who has access to a public source code file in which non-disclosure agreements have been filed. Coalition members have

been filing non-disclosure agreements which contain the names and signatures of their experts for approximately ten months. Everyone agrees these are the experts that will be used if a triable issue is discovered and everyone agrees the defendants are under an obligation to “disclose the names and addresses of witnesses who may be called at trial” prior to the Rule 11 Omnibus Hearing and without a court order. Minn. R. Crim. P. 9.02, subd. 1(3). The defendant sub group, however, believes they may somehow be harmed if some unforeseen event occurs by disclosing identification information already available and likely required by the rules.

Moreover, the defendant sub group demonstrated no actual harm – even assuming arguendo, that some possible non-theoretical harm could occur. They have not even suggested they will be employing their own experts. They also admit they would be, if a part of these assigned cases singing on with the Coalition, whose experts have already been disclosed without objection. The sub group advances some near metaphysical concern that if they consented to participate in these assigned cases; hired their own experts; the experts had an opinion they did not want to share; and the court nevertheless required them to disclose who these people are, they would be harmed. Regardless, even if all of these things occurred, their expert would still be required to sign the non-disclosure agreement and go to the same place where the source code is accessible; CMI's offices in Kentucky, thereby becoming known to CMI, its counsel, and presumably the State of Minnesota and the Coalition. Thus, there is no meaningful way to prevent some identification of persons who review the source code.

The real relief that the sub group may possibly, however remotely, require is the issuance of a protective order should they have a non-testifying expert. Given the

hearing on this issue is before the undersigned, and given the highly technical and complex issue to be resolved, this Court is concerned about the actual evidence and who produces it as contrasted with a theoretical potential witness who will not be testifying.

In sum, for the many reasons stated above, as well as this Court's authority to manage procedures for the resolution of these matters before it, the motion is denied.